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No. 84-484

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MARGO BERKOVITZ, AIDA BERKOVITZ, AND TRISTA BERKOVITZ,
Petitioners,

VS.

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Northern District of California and the Ninth Circuit Court of Appeals correctly concluded that United States courts lack subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act over this wrongful death action where the alleged death occurred in Iran.

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No. 84-434

In the Supreme Court

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OCTOBER TERM, 1984

MARGO BERKOVITZ, AIDA BERKOVITZ, AND TRISTA BERKOVITZ,
Petitioners,

VS.

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals and the order of the District Court for the Northern District of California are identified in the Petition.

STATEMENT OF THE CASE

Petitioners are the heirs of Martin Berkovitz, an American businessman killed in Iran by a terrorist group (Kavir) in January, 1979, during the course of the Iranian revolution. Petitioners' amended complaint, filed in the Northern District of California, alleged that since Kavir's acts were motivated by anti-American and anti-Jewish sentiment and were intended to increase civil unrest and

turmoil in Iran and overthrow the then-existing political regime, the Islamic Republic of Iran (Iran) could be sued in the United States for the death; Kavir was alleged to be an agency or instrumentality of Iran.

The district court dismissed the amended complaint, upon Iran's motion, on the grounds that (a) Iran was immune from suit for the acts alleged under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, *et seq.* (FSIA) and the court therefore lacked subject matter and personal jurisdiction, and (b) petitioners' claim had been settled pursuant to the international agreements which concluded the Iran hostage crisis and therefore the amended complaint failed to state a claim for relief. (Pet. A39-A41)

The Court of Appeals affirmed, concluding that neither the FSIA exceptions to the general sovereign immunity grant nor the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (Treaty of Amity) provided a basis for jurisdiction over the action. (Pet. A20-A38) The Ninth Circuit did not consider the district court's alternative ruling that petitioners' claim had been settled by international agreement. (Pet. A38)

ARGUMENT

Petitioners raise before this Court five arguments, only one of which vaguely resembles what they timely raised, briefed, and argued below. The Ninth Circuit was presented with such issues as whether Iran had waived immunity, either impliedly because it was "unfriendly" to the United States or expressly through the Treaty of Amity (28 U.S.C. § 1605(a)(1)), and whether the fact that Martin Berkovitz went to Iran on business rendered immunity inapplicable

under the commercial activity exception of the FSIA (28 U.S.C. § 1605(a)(2)). None of these arguments, in the manner framed before the Ninth Circuit, are made here. Instead, petitioners claim that:

1. Foreign citizens can sue foreign states in American courts for acts of torture committed in the foreign state under the Alien Tort Statute (28 U.S.C. § 1350), and it would be inconsistent not to grant American citizens the same right.

2. Terrorism by Kavir was actually commercial activity which had the purpose and effect of disrupting trade relations between Iran and the United States.

3. Kavir can be considered both a foreign state and the subject of a foreign state and, if considered the latter, can be sued under general diversity principles.

4. Iran has not shown that it truly is recognized by the United States as a foreign sovereign.

5. Iran's claim to immunity could not be made by lawyers representing it.

Arguments 1 and 3 were first urged to the court of appeals in a petition for rehearing after the Ninth Circuit had already rendered its decision. Arguments 4 and 5 surfaced at the eleventh hour in petitioners' reply brief to the Ninth Circuit and therefore were not timely raised. And Argument 2 represents a "commercial activity" argument drastically different from that made to the Ninth Circuit. Since petitioners are actually asking this Court to consider *de novo* arguments not properly made below, rather than

requesting a review of the Ninth Circuit's decision, it is requested that the petition be denied summarily. *Cf. NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975).

Additionally, the issues raised are substantively meritless and the petition, for the reasons stated below, should be denied.

1. Equal access to the courts

Petitioners incorrectly state that the Ninth Circuit held that subject matter jurisdiction in a wrongful death action against Iran depends on the citizenship of the deceased. The Ninth Circuit opinion nowhere mentions citizenship as a factor; rather the Court considered only whether any of the exceptions to the general immunity grant of 28 U.S.C. § 1604 applied so as to vest jurisdiction in the district court. If Martin Berkovitz or his heirs had been aliens, the court would have been presented with precisely the same immunity issues. *Cf. Verlinden B.V. v. Central Bank of Nigeria*, ... U.S. ....., 76 L.Ed.2d 81, 103 S.Ct. 1962 (1983).

Petitioners argue, however, that under *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a foreigner tortured in another country can sue his tormentors under the Alien Tort Statute (28 U.S.C. § 1350), but that an American citizen similarly tortured cannot. This is an overly simplistic analysis. The defendant in *Filartiga* was an individual who had no claim to sovereign immunity. Had the plaintiff there been an American citizen, he could have predicated jurisdiction against the same defendants for the same acts under general diversity principles (28 U.S.C. § 1332(a)(2)) and not even be bound by the Alien Tort

Statute's strict, and rarely satisfied, requirement that the tort rise to the level of a "violation of the law of nations or a treaty of the United States."

Petitioners imply, without explanation or analysis, that *Filartiga* also stands for the proposition that the Alien Tort Statute supports jurisdiction for suits against foreign state defendants as well, and that foreign states would be stripped of their FSIA immunity in such actions. Those questions were not before the *Filartiga* court, are not before this Court, and their answers are not nearly as self-evident as petitioners would lead us to believe.[1]

In the last analysis, however, even if petitioners are correct that an anomaly in the federal statutory scheme allows a foreigner tortured in a foreign state to sue the foreign state in America but disallows such actions by American citizens, their argument is one better addressed to Congress rather than the courts. The jurisdiction of

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[1]The Congressional intent appears to mandate that *any* action against a foreign state be governed by the FSIA to the exclusion of other statutes. This Court stated in *Verlinden, supra*, that "Congress clearly intended [the FSIA] to govern all actions against foreign sovereigns" (76 L.Ed2d at 90 n. 16) and that the FSIA "must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to sovereign immunity." (76 L.Ed.2d at 92)

But even if the Alien Tort Statute was interpreted as providing an alternative basis of jurisdiction against foreign states, it would seem highly likely that the act of state doctrine would preclude American courts from presuming to sit in judgment over claims by foreign citizens concerning acts of a foreign state occurring within the territory of the foreign state. *Cf. Underhill v. Hernandez* 168 U.S. 250, 252 (1897); *Intern. Ass'n of Machinists, Etc. v. OPEC*, 649 F.2d 1354, 1358-1361 (9th Cir. 1981).

federal district courts is limited to that which Congress has granted them by valid statute. *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 371-372 (1978); *Chase Manhattan Bank v. S. Acres Devel. Co.,* 434 U.S. 236, 239-240 (1978).

2. "Commercial activity" exception

The FSIA expressly provides that a foreign state is *not* immune in any case:

> in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . . [28 U.S.C. § 1605(a)(5).]

Apparently recognizing that since Martin Berkovitz's death clearly occurred in Iran Section 1605(a)(5) would not apply, petitioners have abandoned any attempt to urge that provision as even an arguable basis for subject matter jurisdiction. Rather they make a strained and rather convoluted argument that Kavir's acts of terrorism were commercial in nature and had the effect of disrupting trade relations between Iran and the United States. Jurisdiction, therefore, is said to exist under 28 U.S.C. § 1605(a)(2) which allows suit where the action is based:

> upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

The Ninth Circuit correctly pointed out that whether activity is "commercial" depends on the nature of the activity, not its purpose. That the purpose of Kavir's acts

was to disrupt trade is immaterial; the alleged murder was not a commercial activity. (Pet. A29-A31) Moreover, the "direct effect" of Kavir's acts—the death of Martin Berkovitz—occurred in Iran. Any alleged injuries to his heirs in America were indirect. (Pet. A30-A34) Therefore, neither requirement of the commercial activity exception relied upon by petitioners was satisfied.

3. Diversity jurisdiction over Kavir

Relying on *Lonon v. Companhia de Navegacao, Ect.*, 85 F.R.D. 71 (E.D. Pa. 1979), petitioners argue that Kavir's status as a foreign state under 28 U.S.C. § 1603 does not preclude it from also being considered a citizen or subject of a foreign state under the general diversity statute, 28 U.S.C. § 1332(a)(2).

Iran has never represented Kavir and does not purport to do so here.[2] The Court should be aware, however, that the *Lonon* case was effectively overruled by *Rex v. Cia. Peruana de Vapores, S.A.*, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). And every other Circuit which has considered the matter also has held that the FSIA provides the exclusive jurisdictional vehicle for actions against foreign states and that its provisions super-

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[2]Petitioners' statement that "Iran filed a motion for dismissal [with the district court] as to *both* Iran and Kavir" (Petition 3:11-12; emphasis supplied) is incorrect. Iran moved solely on its own behalf, but did point out through a footnote in its moving papers that since Kavir was alleged to be an agency or instrumentality of Iran, its immunities were coincident with Iran's. 28 U.S.C. § 1603(a).

cede and preempt traditional diversity jurisdiction. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 586-587 (9th Cir. 1983), *cert. denied* October 8, 1984; *Goar v. Compania Peruana de Vapores*, 688 F.2d 417 (5th Cir. 1982); *Williams v. The Shipping Corp. of India*, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Ruggiero v. Compania Peruana de Vapores, Etc.*, 639 F.2d 872 (2d Cir. 1981) (Friendly, J.).

4. Iran not a foreign state

The Berkovitz complaint affirmatively alleged that Iran "was and is a foreign state within the meaning of 28 U.S.C. § 1603(a)." Based on this allegation, the district court properly considered whether it had subject matter jurisdiction under the FSIA and concluded it did not. In their *reply brief* before the Ninth Circuit the Berkovitzes first asserted that Iran was *not* a foreign state and therefore was not entitled to sovereign immunity. The Ninth Circuit noted that this argument was untimely but dismissed it out of hand indicating that it had previously recognized Iran's status as a foreign state in *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), *cert. denied* October 8, 1984.

Indeed both the Executive branch and the courts have consistently recognized Iran as a sovereign entity. The Treaty of Amity has never been repudiated (*See, Sec. Pac. Nat. Bank v. Government and State of Iran*, 513 F.Supp. 864, 879 n.22 (C.D. Cal. 1981); *New England, Etc. v. Iran Power, Etc.*, 502 F.Supp. 120, 125 n.6 (S.D.N.Y. 1980), *remanded*, 646 F.2d 779 (2d Cir. 1981)) and the United States has recognized Iran as a foreign sovereign by entering into agreements concerning release of the hostages and

the termination of lawsuits brought by United States nationals in America against Iran (*Cf. American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 433-436 (D.C. Cir. 1981)). The United States additionally has urged Iran's sovereign immunity from suit, not only in this case,[3] but in others as well (*See, Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), *cert. denied*, October 8, 1984; *McKeel v. Islamic Republic of Iran, supra*). To assert that the United States does not recognize the present Iranian government as a political sovereign is to ignore reality.

Moreover, petitioners fail to show what basis of federal jurisdiction would exist if Iran is deemed *not* to be a foreign state. Petitioners assume, incorrectly, that if an entity holding itself out as a foreign state is not recognized by the United States Government as such, that it can nonetheless be sued under the FSIA but without the immunities conferred by that legislation. Jurisdiction under the FSIA presumes in the first instance, however, that the party sued is a foreign state.

5. Presentation of immunity claim

Citing dictum from an intermediate state appellate court case decided 45 years before the enactment of the FSIA,

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[3]In footnote 3 at page 13, petitioners make the statement that the United States attorney specifically declared at oral argument that the United States does *not* recognize the Islamic Republic of Iran. Besides being unsupported, the statement is untrue. In fact, the United States filed a statement of interest with the Ninth Circuit in which it agreed entirely with Iran's immunity arguments, agreed that the district court properly dismissed the action for lack of subject matter jurisdiction under the FSIA, and urged the Ninth Circuit to affirm.

petitioners argue that only Iran's authorized representatives—not its attorneys—can urge sovereign immunity as a defense. Whatever the procedure for asserting the defense may have been before 1976, the FSIA makes plain that sovereign immunity is now a jurisdictional issue. *Verlinden, B.V. v. Central Bank of Nigeria,* ..... U.S. ....., 76 L.Ed.2d 81, 87 n.5, 103 S.Ct. 1962, 1967 n.5 (1983). Since subject matter jurisdiction is dependent on a finding of no immunity, courts may consider the issue *sua sponte* at any stage of the proceedings, even if no one appears on behalf of the foreign state, and even after a default has been entered. *See, e.g., Letelier v. Republic of Chile,* 488 F.Supp. 665 (D.D.C. 1980). As stated by this Court in the *Verlinden* case:

> The House Report on the Act states that 'sovereign immunity is an affirmative defense that must be specially pleaded'. . . . Under the Act, however, subject matter jurisdiction turns on the existence of an exception to sovereign immunity. . . . Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act. [76 L.Ed.2d at 92 n.20; 103 S.Ct. at 1971 n.20]

Petitioners then cite a passage from *Olsen by Sheldon v. Government of Mexico,* 729 F.2d 641 (9th Cir. 1984) for the proposition that the foreign state bears the burden of proving immunity once a plaintiff alleges a proper basis of jurisdiction under the FSIA. Petitioners go so far as to represent that this proposition was a "holding" in *Olsen.* The cited passage, however, nowhere appears in the Ninth Circuit's reported decision; and, most certainly, it was not a holding of the *Olsen* court.

The issue of which party bears the burden of proving or disproving sovereign immunity was irrelevant in this case. For purposes of the motion to dismiss, Iran conceded the allegations in the Complaint, and the district court as it was required to do (*Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Mark v. Groff*, 521 F.2d 1376, 1378 (9th Cir. 1975)), likewise treated those allegations as true. Since no facts were in dispute, the issue of burden of proof did not arise; rather, the matter was one of law for the court to decide, which it did correctly.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition be denied.

Dated: October 24, 1984

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